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APPENDIX TO PETITION FOR WRIT OF CERTIORARI

Supreme Court, U.S.
FILED
APR 16 1971
E. ROBERT SEAVER, CLERK

In the

Supreme Court of the United States

October Term, 1970

No. 1569

Fibreboard Corporation,
Petitioner,

vs.

National Labor Relations Board, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 16, 1971

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UNITED STATES OF AMERICA

BEFORE THE

NATIONAL LABOR RELATIONS BOARD*

Case 20-CA-1682

FIBREBOARD PAPER PRODUCTS CORPORATION

and

EAST BAY UNION OF MACHINISTS, LOCAL 1304, UNITED STEELWORKERS OF AMERICA, AFL-CIO; and UNITED STEELWORKERS OF AMERICA, AFL-CIO

SUPPLEMENTAL DECISION AND ORDER

On May 23, 1968, Trial Examiner Henry S. Sahm issued his Trial Examiner's Backpay Decision, attached hereto, finding that specific amounts of backpay be awarded to certain employees of the Respondent.[1] Thereafter, the

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*The decisions of the National Labor Relations Board and the Trial Examiner are each very substantial in length. For this reason, and to serve the Court's convenience, the Clerk has agreed that only the portions of these decisions pertinent to the issues presented to this Court need be printed in this Appendix. The entirety of the decisions of the Board and Trial Examiner are available to the Court in the Appendix prepared for the Court below, copies of which have been filed herein by the Clerk of that Court. The references in the Petition to portions of the Appendix ("A.") are to the latter Appendix, not to this one.

1. On March 27, 1961, the Board issued a Decision and Order, 130 NLRB 1558, finding that Respondent had not committed unfair labor practices within the meaning of 8(a)(1), (3), and (5) of the Act and sustaining the Trial Examiner's dismissal of the complaint. The Charging Parties' petition for reconsideration was granted by the Board and on September 13, 1962, the Board issued a Supplemental Decision and Order, 138 NLRB 550, in which it found that "Respondent violated Section 8(a)(5) by unilaterally subcontracting its maintenance work without bargaining with the Charging Unions over its decision to do so." The Supplemental Decision and Order did not modify the original decision with respect to the dismissal of the charges under Section 8(a)(1) and 8(a)(3) of the Act.

On July 3, 1963, (322 F.2d 411) the Court of Appeals for the District of Columbia Circuit granted the Board's petition for enforcement. The Supreme Court, on December 14, 1964, affirmed the judgment of the Court of Appeals, holding that Respondent was obligated to bargain and that the Board's order was within its power to fashion remedies (379 U.S. 203).

Respondent, the Charging Parties, and the General Counsel filed exceptions to the Trial Examiner's Backpay Decision with briefs in support thereof; the Respondent filed a brief in answer to the exceptions of the General Counsel and the Union; the General Counsel filed a brief in answer to Respondent's exceptions, and the Union filed a reply brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the entire record in this case, including the Trial Examiner's Backpay Decision, the exceptions, the briefs, and the answering briefs, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner only to the extent that they are consistent herewith.

(1) The Charging Party (hereinafter referred to as Local 1304 or the Union) excepts to the wage formula found applicable by the Trial Examiner for computing the terminated employees' gross backpay during the backpay period, September 14, 1962 to January 18, 1965.[2] We find merit in the Union's exceptions.

The Local 1304 maintenance machinists were terminated on August 1, 1959; the collective-bargaining agreement between Respondent and Local 1304 had expired at midnight July 31, 1959. According to the provisions of that collective-

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2. The Board's Supplemental Decision (138 NLRB 550) limited backpay to earnings which might have been received from and after the date of the Supplemental Decision, September 13, 1962, rather than from the date of the employees' termination, August 1, 1959. The period August 1, 1959, to September 14, 1962, is referred to as the hiatus period.

bargaining agreement the machinists' wage rates were determined by the so-called "Pabco Wage Formula" (hereinafter "Pabco formula") which established the unit employees rate at "one dollar per day (or 12.5 cents per hour) less than the prevailing Building and Construction Crafts Scale" (construction millwrights).[3] The "Pabco formula", first embodied in the collective-bargaining agreement effective August 1, 1951, was incorporated in each succeeding agreement through July 31, 1959. The ILWU millwrights employed by Respondent received the same wage rates as the terminated machinists from July 1946 to July 31, 1959; the ILWU millwrights' wage rates were not independently established, but were determined by Local 1304's collective bargaining agreement in automatic fashion.[4] After the Union machinists were terminated, the ILWU millwrights, of which there were apparently only 2, continued to work and, in fact, replaced the machinists in the felt mill; however, they received no wage increase until 1961, when it was agreed that they would receive the increases set forth in the collective bargaining agreement between the Respondent

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3. The terms "building trades millwrights", "building and construction crafts" and "construction millwrights" are used interchangeably herein.

At the time of termination the machinists were receiving $3.525 per hour under the "Pabco formula." The hourly rates payable under the "Pabco formula" during the backpay period would have been: September 14, 1962, to July 31, 1963—$4.275; August 1, 1963, to January 18, 1965—$4.505.

4. According to Burke, the ILWU business agent, the ILWU millwrights "waited until [Local] 1304 . . . settled their negotiations and then adjustments were automatically passed on to our group under our contract . . . [I]t was just a matter of processing through payrolls, it was automatic."

and the ILWU production employees.[5] Upon the machinists' termination the Respondent contracted out the maintenance work to an independent contractor, which employed millwrights and paid them the building trades or construction millwright wage rates.[6]

The Trial Examiner rejected the "Pabco formula" and found that the wage rates received by the ILWU millwrights should be utilized in computing the gross backpay of the terminated machinists. In excepting, the Union contends that the "Pabco formula" is the most reasonable and objective criterion for computing the machinists' backpay, since it had appeared in every contract between the parties from 1951 to 1959 and is reasonably close to the wage rates received by the employees of the independent contractor, who replaced the terminated machinists. Moreover, it contends that Respondent has failed to show with reasonable cer-

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5. The Respondent had collective-bargaining agreements with the ILWU production workers; these agreements did not include the ILWU millwrights until 1961.

During the backpay period the ILWU millwrights received the following hourly rates; September 1962 to May 31, 1963—$3.695; June 1, 1963 to May 31, 1964—$3.795; June 1, 1964 to May 31, 1965—$3.895. Beginning June 1, 1965, they received $3.985 per hour.

6. These hourly rates were:
Effective June 16, 1959—$3.76
Effective June 16, 1960—$3.945
Effective June 16, 1961—$4.18
Effective June 16, 1962—$4.40
Effective June 16, 1963—$4.63
Effective June 16, 1965—$4.925

It should be noted that these rates (building trades or construction millwrights) are the same rates upon which the "Pabco formula" was based. Thus, if the machinists had not been terminated and the "Pabco formula" had remained in their contract with Respondent, the machinists actually would have been receiving 12.5 cents per hour less than the independent contractor's employees who replaced them received.

tainty that if it had not been for Respondent's unlawful act, different wage rates would have been negotiated for the 1962 to 1965 backpay period.

The Board's function in this proceeding is to determine the amount of backpay that will, as nearly as possible, make the unlawfully terminated employees whole. This is not always an easy task. For as the Eighth Circuit pointed in *N.L.R.B. v. Brown & Root, Inc.*:[7]

> Obviously, in many cases it is difficult for the Board to determine precisely the amount of backpay which should be awarded to an employee. In such circumstances the Board may use as close approximation as possible, and may adopt the formula reasonably designed to produce such approximations . . . .

In our opinion, the circumstances herein permit only reasonable approximation. We also emphasize that any uncertainty must be resolved against the wrongdoer whose conduct made certainty impossible.[8]

The Trial Examiner correctly found the following principle of law applicable to this case: "Loss of earnings of backpay claimants should be measured by the earnings of their *replacements* or comparable employees" (emphasis supplied). In finding that the rates of the ILWU millwrights are the best measure of what the terminated machinists would have received, the Trial Examiner emphasized that the ILWU millwrights performed work requiring skills comparable to the terminated machinists. He did not consider, however, the wage rates of the independent contractor's employees who actually replaced the terminated machinists on 19 of the 21 jobs he found available during

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7. 311 F.2d 447, 452 (C.A. 8).

8. See *Ozark Hardwood Co.*, 119 NLRB 1130 enfd. 282 F.2d 1, (C.A. 1); *N.L.R.B. v. Miami Coca-Cola Co.*, 260 F.2d 569 (C.A. 5).

the backpay period. Presumably the failure to consider the replacements' wage rates resulted from the fact that he erred with respect to the hourly rates received by the independent contractor's employees since he found that their hourly rate was $4.00 in January 1965, or about the same rate as the ILWU millwrights. In fact, the independent contractor's millwrights were receiving $4.63 in January, 1965.[9] Having erroneously found that the wage rate of the replacements of the backpay claimants was $4.00, the Trial Examiner concluded that it would be contrary to precedent to utilize the "Pabco formula", which would have provided substantially higher wage rates, because gross backpay "should be measured by the earnings of [the backpay claimants'] replacements or comparable employees." However, since the independent contractor's employees who replaced the terminated machinists on 19 of the 21 jobs found available by the Trial Examiner, in fact, received higher rates than the "Pabco formula" would have provided, utilization of the "Pabco formula" presents no conflict with precedent.

In finding the ILWU millwright rates the best measure to determine gross backpay, the Trial Examiner also emphasized that the ILWU millwrights had received the same

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9. The Respondent contends that the Trial Examiner did not err with respect to the rates of the independent contractor, but that the Trial Examiner's reference to a $4.00 rate was, in fact, a reference to the comparative wage cost to Respondent of employing the independent contractor. Although the Trial Examiner's rather ambiguous footnote (No. 23) appears to lend some support to the Respondent's contention, in our opinion, it is not sufficient to overcome the fact that the Trial Examiner found that in January, 1965, "the independent contractor's employees received $4.00." Therefore, we can only assume the Trial Examiner was in error with respect to this finding.

rates as the terminated machinists for 13 years.[10] But he overlooked the fact that historically the ILWU millwrights' wage rates had followed the terminated machinists' rates in an automatic fashion. After August 1, 1959, the ILWU millwrights, of which there were apparently only 2, for one reason or another (be it neglect of their bargaining agent, the fear that they also might be terminated, the realization, as suggested by the Trial Examiner, that their rates were excessive, or just confusion) neither bargained for nor received a wage increase until 1961. From this fact the Trial Examiner concluded that "it is not too unreasonable to assume that they (the ILWU millwrights) recognized the soundness of Fibreboard's claim that the terminated machinists' wage rates under the Pabco formula . . . were too high." To the contrary, it seems just as reasonable, if not more reasonable, to assume that the ILWU millwrights realized that if they requested higher wage rates they might follow in the footsteps of the terminated machinists. In our opinion, if we accept the ILWU millwrights' rates as the backpay period wage rates, we are placed in the rather anomalous position of finding that the backpay claimants' rates should be determined by a control group

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10. The Trial Examiner attempts to bolster his support for the ILWU millwrights' rates by arguing that the rates paid by other employers with whom the Union had contracts should be considered. He points out that the contract of Foremost Food and Chemical provides the highest rates and that the Foremost rate is approximately the same as the ILWU millwrights received during the backpay period. The simple answer to the Trial Examiner's argument, however, is that prior to 1959, Respondent had voluntarily negotiated contracts with the Union which contained rates significantly higher than those paid by Foremost or the other employers with whom the Union had contracts. Thus, in January 1958, the Foremost rate was $2.93 and the Fibreboard rate was $3.375; in January 1959, the Foremost rate was $3.04, and the Fibreboard rate was $3.525. Therefore, unlike the Trial Examiner, we see no reason to attach any significance to wage rates included in contracts negotiated by the Union with any other employer.

(the ILWU millwrights) whose wage rate had previously followed their own, and who, for almost a 3-year period, might not have requested or received a wage increase precisely because of the Respondent's unlawful termination of the backpay claimants.

But the fact deemed most significant by the Trial Examiner in rejecting the "Pabco formula" is that if the "Pabco formula" were adopted, the backpay claimants would receive higher wage rates during the backpay period than the rate the Union eventually agreed to upon their return to work. The Trial Examiner was of the opinion that such a result would be not only specious but strange.

The terminated machinists returned to work in March 1965, at $3.74 per hour "pending negotiations". In July 1965, Local 1304 and the Respondent executed a collective-bargaining agreement which provided a $4.00 wage rate. While we agree that a subsequently negotiated wage rate is one factor to be considered in determining a wage rate applicable to the backpay period, we do not agree that it is the controlling factor. Moreover, it appears necessary to consider the Union's bargaining position in 1965. The negotiations matched a Union weakened by 6 years off the job, without a majority of the former employees back in the plant, against a Respondent determined to preserve the savings it had achieved through its unlawful contracting-out. In addition, the Respondent made it clear that it considered that its only obligation was to talk.[11] In this

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11. Thus, R. C. Thurmann, Respondent's director of industrial relations candidly admitted:

> The very first meeting that I held with 1304 I reviewed with them where we were and that if we had only known back in '59 that we were supposed to do some talking before our minds were made up, why we would have gone through that motion and I said now we are going through that motion now and as you understand fully that we are only obliged to discuss this matter with you and then if we find that we cannot work it out to our satisfaction, we are at liberty to continue on with our contracting.

situation the Union had been warned by its counsel to avoid an impasse at all cost. In the circumstances of this case, we do not believe that the wage rates that resulted from the 1965 bargaining should be considered a controlling factor in the determination of the backpay wage rates.

But, the Respondent contends the Union had the same bargaining weaknesses in 1959 as it did in 1965. Stressing, as did the Trial Examiner, that its decision to subcontract the maintenance work was economically motivated and justified, the Respondent assumes as a foregone conclusion that had bargaining occurred in 1959, the "Pabco formula" would have been eliminated or the maintenance work subcontracted, and contends that the Trial Examiner's finding merely constitutes an attempt to apply the wage rates which in all probability would have resulted from bargaining in 1959.

In its Answering Brief the Respondent states:

> But to assume as does the Union that bargaining in 1959 would have resulted in abandonment by Fibreboard of its plans to contract out the work, and in renewal in that and subsequent years of the old contract and its wage formula is to ignore the fact that this is exactly what Fibreboard refused to do and that it made its refusal stick.

The simple answer to this assertion is that Respondent did not negotiate reduced wage rates in 1959 and that it made its refusal "stick" because it refused to bargain over its decision to subcontract, and that this refusal was precisely the gravamen of its unfair labor practice as found by the Board, the D.C. Circuit Court of Appeals, and the Supreme Court.

For as the Supreme Court said:

> The Company was concerned with the high cost of its maintenance operation. It was induced to contract out the work by assurances from the independent contractor that economies could be derived by reducing the work force, decreasing fringe benefits and eliminating overtime payments. These have long been regarded as matters particularly suitable for resolution within the collective bargaining framework. . . . Yet it contended that when an employer can effect cost savings in these respects by contracting the work out, there is no need to attempt similar economies through negotiations with existing employees or to provide them with an opportunity to negotiate a mutually acceptable alternative. The short answer is that, although it is not possible to say whether a satisfactory solution could be reached, national labor policy is founded on the congressional determination that the chances are good enough to warrant subjecting such issues to the process of collective negotiations.

In the words of the Supreme Court, "it is not possible to say whether a satisfactory solution could [have been] reached . . ." Indeed, as the Respondent contends, the Union might not have been able to persuade the Respondent not to contract-out or retain the "Pabco formula". On the other hand, it is by no means clear that the parties could not have reached an agreement in 1959 which would not have eliminated the "Pabco formula". The fact that the Respondent did not give the Union an opportunity to attempt to reach such an agreement was found violative of the Act. Thus, any uncertainty with respect to what wage rates the backpay claimants would have received except for termination was created by the Respondent, which bears the risk of that uncertainty.

In the circumstances of this case we are of the opinion that the "Pabco formula" provides the most reasonable, acceptable, and objective approximation of what the backpay claimants would have received. Accordingly, we find that the gross backpay of the terminated machinists for the backpay period beginning September 14, 1962, ending January 18, 1965, be computed on the basis of the "Pabco Wage Formula".[12]

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(5) We agree with the Trial Examiner's finding that interest be paid on the net backpay from September 14, 1962.

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(8) The Trial Examiner found that terminated machinists David Arca and Lincoln Beck forfeited their right to reinstatement and backpay because of their picket line misconduct in August, 1959. The Trial Examiner further found that the picket line activity engaged in by Carl Olson in August 1959, did not warrant denying him reinstatement and backpay.

The Respondent excepts to the Trial Examiner's finding that Olson's conduct did not warrant forfeiture of his backpay and reinstatement rights. The General Counsel and the Union except to the finding that Arca and Beck be denied reinstatement and backpay, contending that the Trial Examiner should not have reached the issue whether Arca, Beck, and Olson were subject to forfeiture of backpay and reinstatement, because the Respondent's defense of picket line misconduct with respect to these employees was not timely raised ("barred by laches"). In the alternative, they contend that the conduct of Arca and Beck does not warrant

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12. These hourly rates are:
September 14, 1962 to July 31, 1963—$4.275
August 1, 1963 to January 18, 1965—$4.505

forfeiture of backpay and reinstatement rights; they agree with the Trial Examiner's finding with respect to Olson.

We find it unnecessary to decide whether the alleged picket line misconduct of Arca, Beck, and Olson would, in other circumstances, have warranted forfeiture of their backpay and reinstatement rights, as we agree with the contention of the General Counsel and the Union that Respondent's defense with respect to picket line misconduct was not timely raised.[37]

The alleged misconduct of Arca, Beck, and Olson involved picket-line incidents that occurred in August 1959, more than a month prior to the original unfair labor practice hearing. The Respondent does not contend that it had no knowledge of the alleged misconduct; in fact, it had litigated the matter of alleged misconduct in the Alameda County Superior Court from August 24 to September 11, 1959, which was before the Board's unfair labor practice hearing, held on September 21 and 22, 1959.

It should be noted that the General Counsel's Complaint of September 2, 1959, alleged the discharge of the Respondent's maintenance employees, represented by the Union, as violative of Section 8(a)(3) as well as Section 8(a)(5) of the Act.[38] The Trial Examiner on November 27, 1959, rec-

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37. At the backpay hearing, the General Counsel objected to the receipt of any evidence (oral or documentary) concerning the alleged picket line misconduct of Arca, Beck and Olson; these objections were overruled. The contention that the Respondent's defense to the reinstatement and backpay rights of these backpay claimants could not be raised at this stage of the procedings was renewed by the General Counsel in his brief to the Trial Examiner. Nevertheless, the Trial Examiner did not mention the contention in his Decision.

Member Zagoria would adopt the Trial Examiner's findings as to Arca and Beck.

38. In view of this fact, the Respondent's contention that this case should be contrasted to cases arising under Section 8(a)(1) and 8(a)(3) appears to be without substance.

ommended that the complaint be dismissed in its entirety.[39] On March 27, 1961, the Board sustained the Trial Examiner's findings (130 NLRB 1558) and dismissed the complaint. After the Union's May 11, 1961 petition for reconsideration was granted by the Board, the Respondent, on July 11, 1962, filed a petition to reopen the record for the introduction of testimony relating to the reduction of its maintenance department work force; that petition made no reference to picket-line misconduct of terminated employes.

The Respondent's petition to reopen the record was denied (138 NLRB 550, footnote 2) on the grounds that the matter was one "more properly treated at the compliance stage of the proceedings." The Respondent contends that had it moved that the record be reopened to present evidence that certain employees had disqualified themselves from reinstatement and backpay the Board's answer would have been the same. The Respondent would thus equate the diminution of jobs, wage rates, and failure to exercise due diligence in seeking other work during the backpay period with the issue of disqualification for misconduct or "cause". We do not agree with the Respondent's contention, for the former issues are properly matters for compliance in that they go to the issue of the amount of Respondent's liability

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39. The Alameda County Superior Court issued its findings of fact and conclusions of law on October 7, 1959 (the decision and judgment were not rendered by the Court until December 2, 1959), which was before the parties had filed briefs with the Trial Examiner in the unfair labor practice proceeding. However, the Respondent did not raise the issue of picket-line misconduct in its brief to the Trial Examiner, request that the Court's findings be made part of the record, or request that the record be reopened to receive evidence in this matter.

or damages, whereas the latter issue goes to the remedy itself (the *right* to reinstatement).[40]

Moreover, the Respondent fails to consider that unlike the defense of disqualification for misconduct, the question of diminution of jobs cannot be considered with any finality until an offer to reinstate has been made and accepted, and the backpay period is thereby established. The issue of disqualification for misconduct, however, can be determined with finality in the original proceding (providing the facts were then known) and is not dependent on the establishment of the backpay period, or the changing nature of Respondent's business. Thus, the issue of employee misconduct ("cause") which warrants forfeiture of backpay and reinstatement goes to the remedy and not to the issue of compliance with the remedy.

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40. For example, if the defense of diminution of jobs is raised, the *right* to reinstatement and backpay of the employee involved is not in question, rather, the issue is whether the Respondent is able to comply (i.e., whether the employee's former or a substantially equivalent position is available). If an employee's position is at first unavaliable but later becomes available, the employee remains entitled to it. On the other hand, when an employee is denied reinstatement and backpay for "cause" (misconduct) he has no right to reinstatement or backpay whether his former position is available or not. In this connection see *John F. Cuneo Co.*, 152 NLRB 929, where the Trial Examiner found that an employee had been unlawfully discharged but refused to receive the Respondent's evidence attempting to prove that reinstatement should be denied because the employee had disqualified himself for reinstatement. The Board affirmed the finding that the discharge was unlawful, but remanded the proceeding to the Trial Examiner for determination of the employee's suitability for reinstatement because the determination of that issue at the unfair labor practice hearing was material to the appropriateness of the usual remedy of reinstatement and backpay. See also *I. Posner, Inc.*, 133 NLRB 1567, footnote 1.

We must also consider the effect, if any, of the Court's decree enforcing the Board's order.[41] Although we have found no case directly in point, an examination of the cases indicates that the courts look with disfavor on belated attempts to assert misconduct defenses to the reinstatement remedy as opposed to defenses which go to the amount of the Respondent's backpay liability which the courts consider to be questions within the Board's special competence.[42]

In *N.L.R.B. v. Mastro Plastics Corporation,* 261 F.2d 147, (C.A. 2), the employer, which had been ordered to reinstate a number of unlawfully discharged employees, refused to reinstate one of them because she had been convicted of disorderly conduct on the picket-line, both the conduct and the conviction having occurred before the unfair labor practice hearing. The Second Circuit held (at 148):

> Although the discharge and reinstatement of these employees were the 'central' issues in dispute, Mastro never asserted the improper conduct of Yolanda Flamio or her disorderly conduct convictions as a ground for not reinstating her. No valid reason has been offered by respondents to excuse their failure to raise the conviction issue before the Trial Examiner. Their failure

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41. The Board's Supplemental Decision and Order was upheld by both the Court of Appeals for the D.C. Circuit (322 F.2d 411) and the Supreme Court (379 U.S. 203). The Supreme Court held that the Board's Order was within its power to fashion remedies, ". . . when the loss of employment stems directly from an unfair labor practice as in the case at hand." The Board's order is clear and unequivocal as to reinstatement:

"The . . . Board orders that . . . Fibreboard . . . offer to those employees [represented by the Union] immediate and full reinstatement to their former or substantially equivalent positions . . . ."

42. See *N.L.R.B. v. Kohler Co.,* 351 F.2d 798 at 801, (C.A. D.C.). See also *Wallace Corp. v. N.L.R.B.,* 159 F.2d 952 (C.A. 4); *N.L.R.B. v. Bird Machine Co.,* 174 F.2d 404 (C.A. 1).

> to assert the conviction before the Board would itself have precluded them from asserting it here in 1954, 29 U.S.C.A. [Section] 160 (e), and necessarily prevents such assertion now.

Mastro was adjudged guilty of contempt and required to offer reinstatement to the employee to purge itself.[43]

Likewise, the Fifth Circuit declined to remand a case to the Board to consider evidence of alleged union misconduct during a strike (which conduct had been raised as a defense to the unfair labor practice), on the issue of reinstatement of strikers, because there had been, ". . . no proper offer of specific and relevant proof on the reinstatement issue," at the unfair labor practice hearing to show the strikers were engaged in such misconduct. The Board's order was enforced.[44]

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43. The Respondent would distinguish *Mastro Plastics* since the contempt convictions, in the instant case, were not handed down until more than 2 months after the close of the unfair labor practice hearing. In our opinion this alleged distinction is without merit, for as the court pointed out, "Mastro never asserted the *improper conduct . . . or* her disorderly conduct conviction as a ground for not reinstating her." [emphasis added]. The court's language indicates that the defense would not have been barred if either the improper conduct or the conviction had been asserted in the original proceeding. Moreover, it should be noted that both the Board and the courts have indicated that a contempt conviction for violation of a state court injunction is not controlling or dispositive on the question of whether employees should be reinstated. (see *N.L.R.B. v. Cambria Clay Products Co.*, 215 F.2d 48, (C.A. 6); *J. H. Rutter-Rex Mfg. Co., Inc.*, 158 NLRB 1414 at 1419 footnote 8).

44. *N.L.R.B. v. Lambert, d/b/a Sue-Ann Mfg. Co.*, 211 F.2d 91 (C.A. 5). The Respondent, however, citing *Elmira Machine and Specialty Works, Inc.*, 148 NLRB 1695, contends that if the Board finds the misconduct defense barred, its finding will be contrary to its own precedent.

In our opinion, *Elmira* is distinguishable from the instant case on at least 2 grounds: First, there is no indication that the impropriety of considering misconduct of reinstated employees in the backpay proceeding was asserted; neither the General Counsel nor the union filed exceptions to the Trial Examiner's Supplemental Decision. Therefore, the Board did not pass on the issue.

Secondly, in *Elmira* there was not an intervening Court decree enforcing the Board's reinstatement order as in the instant case.

It therefore appears that the Court decree enforcing the Board's order that the terminated machinists be offered reinstatement precludes our consideration of the misconduct defense at this stage of the proceeding.

The Respondent could have raised the alleged misconduct at the hearing held on September 21 and 22, 1959, just a month after the alleged occurrence. Respondent could have petitioned the Board to reopen the record to receive the evidence at any time up to the presentation of the case to the Court of Appeals, as provided in Section 10(c) of the Act. Likewise, at any time before the Court of Appeals decision on July 3, 1963, Respondent could have applied for a remand to the Board to hear this evidence, pursuant to Section 10(c) of the Act. In our opinion, the misconduct defense based on facts of which the Respondent had knowledge in August 1959, has been raised too late to be now considered by the Board as a ground for barring reinstatement and cannot be asserted as a bar in this backpay proceeding, the purpose of which is to determine the amounts of backpay due Arca, Beck, Olson[45] and the other terminated machinists.

Justice Frankfurter, in *N.L.R.B.* v. *Donnelly Garment Co.*, 330 U.S. 219, succinctly stated the principle involved:

> Due process does not afford a party the right to treat as a dress rehearsal a hearing on the issues for which the hearing was adequate. And the Wagner Act does not require that ground be covered a second time, or piecemeal.

45. Olson was not offered reinstatement by Respondent. The Trial Examiner computed Olson's backpay to June 30, 1967, apparently the date upon which the Trial Examiner thought Olson's job was eliminated. However, the parties stipulated that Olson's job was eliminated on October 21, 1967, and not June 30. Accordingly, we have computed Olson's backpay to the date his job was eliminated, October 21, 1967.

Accordingly, we find that backpay claimants Arca[46] and Beck are entitled to reinstatement.[47]

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46. The General Counsel contends, and we agree, that the backpay period for Arca and Beck still continues and will continue until such time as the Respondent extends to them an adequate offer of reinstatement.

The Trial Examiner erroneously found that there was no dispute as to the average base-period quarterly earnings of the machinists since there is such a dispute with respect to the average quarterly earnings of David Arca. Arca was on leave of absence to attend to union business for 8.8 weeks during the base period (August 4, 1958 to July 31, 1959). The General Counsel, as he did with all other employees who did not work a full year during the base period, projected Arca's average quarterly earnings during a full year. He arrived at average quarterly earnings of $2,045.19 for Arca. The Respondent, although it conceded the correctness of such projections made as to other employees, objects to such a projection in the case of Arca. We find the method employed by the General Counsel to be a reasonable means for determining average base-period quarterly earnings, and that it is just as reasonable for Arca as it is for the other employees. We have, therefore, calculated Arca's backpay on the basis of $2,045.19 average base-period quarterly earnings.

47. Contrary to the General Counsel's contention, we find that the hourly wage rates set forth in the collective bargaining agreement between the Respondent and the Union, effective July 15, 1965, retroactive to March 22, 1965, and not the "Pabco formula" should be applied in computing the backpay of Arca, Beck and Olson after March 22, 1965.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Fibreboard Paper Products Corporation, its officers, agents, successors, and assigns shall make the employees involved in this proceeding whole by payment to them in the following amounts:

	Name	Back Pay Due
	Machinists	
1.	Nash, Lloyd J. (see Appendix)	$ 1,272.71
2.	Jackson, Warren C.	8,217.48
3.	Beck, Lincoln E. (see Appendix)	27,850.39
4.	Wittorff, Detlif C.	5,529.70
5.	Crispino, Manuel (see Appendix)	318.57
6.	Hamidy, Robert (see Appendix)	1,722.49
7.	Cruze, Joseph S.	10,752.27
8.	Johnson, Fred Clarence	19,293.91
9.	Schlotterbeck, Eugene	9,782.66
10.	Bennett, Florin F. (see Appendix)	62.96
11.	Schoenfeld, Milton H. (see Appendix)	5,546.32
12.	Arca, David (see Appendix)	6,704.69
13.	Goranson, George W.	4,830.68
14.	Jensen, Raymond D.	16,792.36
15.	Longnecker, Joe E.	8,906.63
16.	Bradford, Harry C.	8,062.19
17.	Fusare, Alex J.	8,661.34
18.	Price, Joe	22,230.90
19.	Cunningham, Harry L.	12,093.51
20.	Raineri, Louis C.	21,688.93
21.	Reihl, William W.	6,671.27
22.	O'Leary, Vincent John[54]	7,986.24
23.	Fontes, Clifford L.[55]	3,086.78
24.	Lippert, Donald W.[56]	8,895.02
25.	Vanderbeck, Joseph P.[57] (see Appendix)	6,691.99
26.	Weismiller, Jr. Gerald[58] (see Appendix)	3,575.64

Power House Employees

27.	Lowell, Fredric Lincoln (see Appendix)	$ 5,851.83
28.	Hughes, Robert Edgar (see Appendix)	18,082.36
29.	Haueter, Herbert F.	11,044.87
30.	Johnson, Elmer T. (see Appendix)	18,305.72
31.	Novacek, George R.	7,326.95
32.	Olson, Carl W. (see Appendix)	12,615.70
33.	Giffin, John L. (see Appendix)	3,209.82
34.	Mann, Eugene G.	7,819.12
35.	Van Zoen, Jacque J.	3,892.18
36.	Wall, James R.	5,555.77
		$330,931.95

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54. The opening for O'Leary was created by the fact that Crispino was disabled from prior to the commencement of the backpay period until his compulsory retirement date (10/1/62).

55. The opening for Fontes was created by the fact that Bennett was disabled from prior to the commencement of the backpay period until his compulsory retirement date (12/1/62).

56. The opening for Lippert was created by the fact that Cruze was disabled from prior to the commencement of the backpay period until Hamidy's retirement date (12/1/62). Thus, Lippert would have replaced Cruze from 9/14/62 to 12/1/62 and Hamidy thereafter.

57. The opening for Vanderbeck was created by Cruze's continued disability from 12/1/62 (Hamidy's retirement date) until 4/1/63, Wittorff's retirement date. Thus, Vanderbeck would have replaced Lippert (who replaced Cruze from 9/14/62 to 12/1/62 and then Hamidy, whose retirement date was 12/1/62) for the disabled Cruze from 12/1/62 to 4/1/63 and then Wittorff whose retirement date was 4/1/63 for the remainder of the backpay period.

58. The first opening for Weismiller was created by Cruze's continued disability from 4/1/63 (the date Vanderbeck would have become eligible for the retiring Wittorff's job) to 4/15/63 when Cruze would have returned to work. The second opening was created when Nash reached his compulsory retirement date on 3/1/64.

With respect to those employees whose backpay is still accruing,[59] as found herein, payment to them of the amount found to be due and accruing constitutes satisfaction of Respondent's obligation only up to the date set forth in the Appendix, which is the end of the period covered by the backpay specification.

Dated, Washington, D.C., Dec 15 1969

Frank W. McCulloch, Chairman

John H. Fanning, Member

Sam Zagoria, Member

(SEAL)

NATIONAL LABOR RELATIONS BOARD

[The Appendix to the Board's Supplemental Decision and Order, consisting of nine pages, has not been printed in this Appendix.]

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59. David Arca and Lincoln Beck.

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

Division of Trial Examiners
Branch Office
San Francisco, California

Case No. 20-CA-1682

FIBREBOARD PAPER PRODUCTS CORPORATION

and

EAST BAY UNION OF MACHINISTS, LOCAL 1304, UNITED STEELWORKERS OF AMERICA, AFL-CIO; and UNITED STEELWORKERS OF AMERICA, AFL-CIO

[List of Counsel Omitted]

Before: HENRY S. SAHM, Trial Examiner

TRIAL EXAMINER'S BACKPAY DECISION[1]

History of Proceedings

The Company and the Union have had a history of collective bargaining dating from 1937.[2] The last of these con-

1. The transcript of the hearing is hereby corrected in accordance with the parties' joint motion dated February 19, 1968.

2. The Company is referred to interchangeably herein as Respondent and Fibreboard and the Union also as Local 1304.

tracts expired on July 31, 1959. Between 1954 and 1956 the Respondent Company had under consideration the feasibility of contracting out its maintenance work as a measure of effecting plant economies. The study was renewed in June 1959. As a result of the renewed study, Respondent let out its maintenance work to an independent contractor and terminated 53 of its maintenance employees. The Union then initiated proceedings and the Board found the Company to have committed an unfair labor practice within the meaning of Section 8(a)(5) of the National Labor Relations Act, herein called the Act,[3] and ordered the Company to reinstitute the maintenance operation performed by the employees represented by the Union and to reinstate the employees to their former or substantially equivalent positions with backpay computed from the date of the Board's supplemental decision to the date of the Company's offer of reinstatement to the terminated employees.[4] On appeal, the Court of Appeals for the District of Columbia granted the Board's petition for enforcement, 322 F.2d 411. The decision was affirmed by the Supreme Court, 379 U.S. 203, 85 S.Ct. 441, on December 14, 1964.

A controversy then arose over the amount of backpay due the terminated employees. The General Counsel claimed $378,545; the Respondent Company, $118,136. Thereafter, the Regional Director for the Twentieth Region on August 17, 1967, issued backpay specifications for the purpose of

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3. The Board in its original decision (130 NLRB 1558) dismissed the complaint but upon reconsideration it found the Respondent had violated the Act and ordered reinstatement and backpay for the terminated employees (138 NLRB 550).

4. 138 NLRB 550. The Board limited backpay to earnings which might have been received from and after the Board's final order in its supplemental decision and not from the date the Company terminated the employment nor from the date of the original decision.

determining the amount of backpay, if any, due to these terminated employees. Respondent thereupon filed an answer which was subsequently amended on October 13, 1967. Hearings were held after prehearing proceedings before Trial Examiner Henry S. Sahm in San Francisco, California, on various dates between October 16 and December 15, 1967. Briefs were filed by the parties on February 19, 1968, and reply briefs ten days later.

The Salient Issues

1. Although there is agreement among the parties as to the base period quarterly earnings for the year preceding August 1, 1959, and also for interim earnings, medical expenses and other deductible expenses, there is disagreement as to the wage formula that should be applied in computing the terminated employees' gross backpay during the backpay period which commences on September 14, 1962, and ends on January 18, 1965. The contract under which the parties operated prior to the time the employees were terminated had a wage formula which provided that wage scales shall be established at 12½ cents per hour less than the building trades millwrights' rate. The Employer, Fibreboard, takes the position that since this contract expired on July 31, 1959, when the employees were terminated, the validity of this formula expired with it. Therefore, its argument continues, one must look to or have recourse to other indicia in determining what the appropriate wage rate should be during the backpay period. This wage rate, contends Respondent, should be the hourly wage rates paid its ILWU millwrights who from 1946 to 1959 received the same rate and did comparable work as the terminated machinists.

The Union's position is that the contract did not terminate but continued in effect, automatically renewed each year for a 1-year term from August 1, 1959, until the parties negotiated a new contract in July 1965. Therefore, argues the Union, the above-described formula embodied in the contract is the most appropriate measure of the wage scale available and, accordingly, should be applied.

The General Counsel argues that whether or not the contract terminated is immaterial because the best objective formula to be applied in computing the employees' gross backpay is the formula in the contract which was used since 1951 to establish the employees' wage scale.

2. Also, in dispute is the number of jobs which were available during the backpay period when the terminated employees were replaced by an independent contractor.

3. Whether the Company is obligated to the dischargees for certain specified pension benefits for the period from August 1, 1959 (the date of the employees' termination), to September 14, 1962 (the date the Board's supplemental decision issued), for which period of time no backpay was ordered by the Board.

4. Whether severance payments made at the time the employees were terminated should be deducted from backpay due.

5. What the appropriate compulsory retirement dates are with respect to seven terminated employees.

6. Whether interest on backpay should accrue even though the Board's supplemental decision contained no order that interest be paid.

7. Whether three dischargees forfeited their rights to reinstatement and backpay because of alleged picket line violence.

COMPUTATION OF GROSS BACKPAY

The General Counsel and Union's Contentions

Counsel for the General Counsel and the Union contend gross backpay should be computed on the basis of the terminated employees' basic wage rate to the wage rate of the construction millwrights in the Bay Area of Northern California. This "objective" criterion, they state, was originally embodied in the Union and Respondent Company's collective-bargaining agreement effective August 1, 1951,[5] and had been incorporated in each succeeding agreement through July 31, 1959. Section I of these collective-bargaining agreements established the wage scale formula of the unit employees[6] "at one dollar per day less than the prevailing Building and Construction Crafts' scale" [construction millwrights] and further provided that the said wage scale "shall be applied automatically August 1 of each year."[7] The said agreements also established a workday of 8 hours. Accordingly, the $1 per day amounted to a differential of 12½ cents per hour.[8]

The constructio crafts' [millwrights] hourly scale for work of the type performed by the unit maintenance machinists employees, the dischargees herein, as set forth in applicable contracts during the backpay period of Septem-

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5. Union's Exhibit No. 4.

6. Classifications encompassed within the unit of maintenance employees were: maintenance machinists, firemen, engineers, helpers, and working foreman. See Appendix "A" of Union's Exhibit No. 4.

7. The terms "building trades millwrights, building and construction crafts," and "construction millwrights" are used interchangeably in the transcript and in this decision.

8. Also known as the "Pabco formula." See Section 1 of Union's Exhibit No. 4.

ber 14, 1962, to January 18, 1965, was as follows: June 16, 1962—$4.40; June 16, 1963—$4.63, and June 16, 1965—$4.925.[9] Accordingly, contends the General Counsel and the Union, the basic hourly wage rate of the terminated employees which should be applied in computing their gross backpay is 12½ cents per hour less than the construction crafts' scale or: August 1, 1962—$4.275; August 1, 1963—$4.505, and August 1, 1965—$4.80.

The General Counsel claims that the quarterly gross backpay for each terminated employee should be determined by multiplying each one's average quarterly earnings by a factor obtained by dividing the applicable backpay period wage rate by the basic wage rate of $3.525 of the parties' collective-bargaining agreement in effect at the time of the unfair labor practices. Thus, under the General Counsel's formula the factors applicable to various portions of the backpay period, reflecting changes in the wage scale, are as follows:

September 14, 1962, to July 31, 1963—$\frac{4.275}{3.525}$ or 1.212;[10] and for the period from August 1, 1963, to July 31, 1965—$\frac{4.505}{3.525}$ or 1.278; and from August 1, 1965, to July 31,

9. The wage rates of the construction crafts, also referred to as building trades millwrights, that were in effect from 1959 to the beginning of the backpay period were: June 16, 1959—$3.76 an hour; June 16, 1960—$3.94½, and June 16, 1961—$4.18.

10. The gross backpay for each employee for the fraction of a quarter from September 14 to September 30, 1962, was computed by the General Counsel by multiplying 0.19, representing the fraction of a quarter involved, by his average quarterly earnings and then multiplying the product thereof by the appropriate factor for that period, namely, 1.212.

$$1967 - \frac{4.80}{3.525} \text{ or } 1.361.^{11}$$

In refuting the Company's contention that the contract between the parties terminated on July 31, 1959, (page 2, *supra*), and with it, the validity of this above-described wage formula, the Union argues that the contract did not terminate but continued, automatically renewed each year until a new contract was negotiated in July 1965.

The contract which was in effect on July 31, 1959, the date when the employees were terminated, provides at page 1, a renewal clause which reads as follows:

> This Agreement shall continue in full force and effect to and including July 31, 1959, and shall be considered renewed from year to year thereafter between the respective parties unless either party hereto shall give written notice to the other of its desire to change, modify, or cancel the same at least sixty (60) days prior to expiration.
>
> Within fifteen (15) days after notice of reopening is given, the opening party shall submit a complete and full list of all proposed modifications. All other sections shall remain in full force and effect. Negotiations shall commence no later than forty-five (45) days prior to the anniversary date of the Agreement unless otherwise mutually changed.

On May 26, 1959, the Union sent Respondent Fibreboard a letter notifying it as follows:[12]

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11. The gross backpay of each terminated employee for the period January 1 to January 18, 1965 (end of backpay period), was computed by the General Counsel by multiplying 0.20, representing the fraction of the quarter involved, by his average quarterly earnings and then multiplying the product thereof by the appropriate factor for that period, namely, 1.278.

12. Respondent's Exhibit No. 2.

> Pursuant to the provisions of The Labor Management Relations Act, 1947, you are hereby notified that the Union desires to modify as of August 1, 1959, the collective-bargaining agreement contract dated July 31, 1958, now in effect between the Company and the Union.
>
> The Union offers to meet with the Company at such early time and suitable place as may be mutually convenient, for the purpose of negotiating a new contract.

On June 15, 1959, the Union sent a letter to the Company specifying various proposals which it desired to discuss.[13] These proposals included wage scales, seniority, hours of work and overtime, holidays, night differentials, vacations, welfare plan, adjustment of complaints and the payment of 5 cents per hour to provide for supplementary unemployment benefits for employees laid off in a reduction in force.

The Union contends that in interpreting the above notice vis-a-vis the renewal clause of the contract, *supra,* a distinction must be drawn between a notice to terminate and a notice to modify. This letter, argues Union's counsel, is a notice to modify not terminate and, therefore, no notice to terminate was sent by the Union within the meaning of said contract's above-quoted renewal provision. Accordingly, concludes the Union, the contract was renewed for another year, namely, to July 31, 1960, subject to negotiations on those sections of the contract opened for modification, thus establishing that the wage formula in the contract continued in effect from August 1, 1959, to January 18, 1965, the end of the backpay period or until a new contract was executed by the parties in July 1965.

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13. Respondent's Exhibits Nos. 3(a) and (b).

Respondent's Contentions

Respondent states that the General Counsel and the Union's computation of gross backpay on the basis of the wage formula in the contract which terminated on July 31, 1959, results in a wage scale throughout the backpay period higher than the $4 rate to which the parties agreed when they executed a collective-bargaining agreement in July 1965. The Respondent asks rhetorically if it is reasonable to credit these terminated employees throughout the backpay period with wage rates higher than what the reinstated employees ultimately received when they returned to work pursuant to the Supreme Court's decision. Moreover, argues Respondent, the record clearly shows that the work done by the ILWU millwrights and the terminated machinists was comparable in skill as evidenced by the historical identity of their hourly wage rates from 1946 to 1959, and the fact that they were both being paid the same wage rate when the machinists were terminated. Therefore, contends Respondent, the formula which should be applied in computing what the dischargees would have received during the backpay period is the hourly wage rate which was paid by Respondent to its ILWU millwrights from September 14, 1962, to January 18, 1965.

Conclusions

Contract Termination

In determining whether the collective-bargaining agreement executed on September 24, 1958, expired on July 31, 1959, as Respondent contends, or automatically renewed itself each year until a new contract was negotiated in July 1965, as the Union claims, it should be borne in mind that not only did the Board in its original Decision and Order

state that the contract "expired July 31, 1959,"[14] but also there is no reference to the matter of contract termination in the Board's Supplemental Decision and Order.[15] Moreover, the Board stated in its original decision that "automatic renewal of the existing contract with the Steelworkers had been forestalled by the Union's letter of May 26, requesting substantial modifications in the existing contract."[16] The Trial Examiner in his decision also stated "the contract terminated . . . on July 31, not only by its own terms but also by reason of the Steelworkers' May 26 notice."[17] Furthermore, when the Union's letter of May 26, 1959, notifying the Company of its "desire to modify" the contract is considered in the context of a specific provision in said contract that it "shall continue in full force and effect from year to year unless either party shall give written notice of its desire to change, modify, or cancel the same at least sixty days prior to expiration,"[18] it would appear the Union's contention that the contract was not terminated passes the outermost bounds of reason. It simply will not bear the construction which Union's counsel propounds. Furthermore, the Union's reason for claiming the contract did not expire is without merit because the language of the renewal clause is unambiguous and clear in its meaning. It plainly and explicitly states that if no agreement is reached upon the Union's proposed modifications before the contract expiration date, the collective-bargaining agreement will terminate. Accordingly, in evaluating the foregoing circumstances, it is found that the parties' collective-bargaining agreement terminated at midnight on July 31, 1959.

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14. 130 NLRB 1558 at 1559.
15. 138 NLRB 550.
16. See page 5, *supra*.
17. 130 NLRB at 1573.
18. Respondent's Exhibit No. 1 at page 1.

Backpay Wage Rate

There is agreement among the parties with respect to the average quarterly earnings of each terminated employee during the base period, August 4, 1958 through July 31, 1959, as well as their interim earnings, medical and other expenses incurred in connection with interim employment. It was stipulated that, beginning with 1946 and ending on July 31, 1959, wage rates of millwrights, members of the International Longshoremen's and Warehousemen's Union, hereinafter referred to as ILWU millwrights (who are not to be confused with the ILWU production workers), employed in Respondent's Emeryville plant, received the same wage rates as the terminated maintenance machinists whose backpay is in issue. Subsequent to the machinists' termination, the ILWU millwrights continued to work throughout the backpay period and some of them replaced the terminated machinists in the felt mill and paint shop. It is uncontroverted that the wage rate paid by Fibreboard to its ILWU millwrights during the backpay period was identical with the hourly rate paid maintenance machinists under the Union's contract with Foremost Food and Chemical Company and that this was the highest wage rate paid maintenance machinists in the Bay Area[19] under any contracts that the Union herein had with other companies which employed maintenance machinists doing work and requiring skills comparable to that of the maintenance machinists at Fibreboard. See Respondent's Exhibits Nos. 7 and 9. In July 1959, Respondent's ILWU millwrights received $3.52 ½ per hour, the same as the terminated maintenance machinists. In September 1962, the beginning of the backpay period, the

19. The "Bay Area" encompasses the following nine counties: San Francisco, San Mateo, Contra Costa, Alameda, Marin, Sonoma, Solano, Napa and Santa Clara. U.S. Census Bureau.

ILWU millwrights wage rate was $3.695 per hour; June 1, 1963—$3.795 per hour; June 1, 1964—$3.895 which hourly rate remained in effect until June 1, 1965, when it was increased to $3.985.

It also stipulated that when the terminated maintenance machinists were reinstated on March 22, 1965, they received $3.74 per hour upon their return to work as compared with the $3.895 which Respondent's ILWU millwrights were receiving at that time. Subsequently, on July 7, 1965, the Respondent and Union negotiated a contract in which they agreed upon a wage rate of $4 per hour for the reinstated maintenance machinists, effective July 15, retroactive to March 22, 1965. And on June 1, 1965, the Respondent's ILWU millwrights' hourly wage rate was increased to $3.985.

It will be recalled that the Union and General Counsel contend that the wage rates the terminated maintenance machinists should be credited with during the backpay period should be determined by the "Pabco wage formula" embodied in the contract which expired on July 31, 1959.[20] The Respondent Fibreboard claims, however, the best measure of what the reinstated employees would have received during the backpay period is the rate Respondent paid its ILWU millwrights who did work comparable in skills and whose wage rate for 13 years had been the same as the terminated maintenance machinists.

If the General Counsel and Union's formula were to be adopted, the dischargees would receive an hourly wage of $4.505 for the last 6 months of the backpay period as contrasted with both the $3.74 rate at which they returned to

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20. The Pabco wage formula provides a wage rate of 12½ cents an hour less than the construction millwrights' wage scale. See page 3, *supra*.

work in March 1965, and the $4 per hour agreed upon subsequently by the parties under their collective-bargaining agreement effective July 15, 1965. Moreover, the wage rates which would have been payable under the 1959 expired contract, had it remained in effect, would have been excessive as compared with the wage rates paid by other employers in the Northern California Bay Area who had contracts with the Charging Union involving their maintenance machinists. The highest wage rates paid maintenance machinists during the backpay period under any of said contracts were those paid by the Foremost Food and Chemical Company. See Respondent's Exhibit No. 9. It is uncontroverted that during the first portion of the backpay period, beginning in August 1962, Foremost's maintenance machinists were receiving $3.57 per hour as contrasted with $4.275 which would have been payable under the "Pabco" formula in the Fibreboard contract for the period August 1959 to August 1960. [21] This $3.57 Foremost figure for August 1962, as compared with the $4.27½ Pabco rate as of August 1959, reveals that the "Pabco" formula is both unreasonable and unrealistic. Corroborative of this predicate is the Board's finding in its decision that Fibreboard's concededly valid economic reason for subcontracting its maintenance work to an independent contractor in 1959 was due to its maintenance costs being too excessive.[22]

If the Union's theory were to be given credence that the contractual wage formula in the 1959 agreement remained operative thereafter, it would have resulted in an automatic wage increase to $3.53½ an hour for the unit employees beginning in August 1959, whereas more than 5 years later in January 1965, and in an economy of rising prices, the independent contractor's employees received $4, and the

21. See pages 3, 4 and footnote 9, page 4.

22. *Fibreboard Paper Products Corporation,* 130 NLRB 1558.

reinstated dischargees upon their reinstatement in March 1965, received $3.74 which was raised four months later to $4, and Respondent's ILWU millwrights received a wage rate of only $3.895. [23]

Moreover, if the General Counsel and Union's backpay formula were to be adopted, the employees would receive during the last quarter of 1962, a wage rate of $4.27½ as contracted with the $4 eventually agreed upon in July 1965. Continuing this comparison, the contractual or "Pabco" formula would have resulted in wage rates of $4.50½ per hour for the backpay period from August 1, 1963 to August 1, 1964, and $4.80 as of January 18, 1965, the end of the backpay period, or 50 cents and 80 cents per hour more than the $4 wage rate discharged employees subsequently received under the contract which was executed in July 1965 after their reinstatement.[24] It would not only be specious, but

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23. The record is not entirely clear as to the exact wage rate the independent contractor who took over the duties of the terminated unit employees was paid by Respondent in January 1965, but it appears to have been approximately $4 per hour. It should be noted in this regard that the independent contractor paid his employees time-and-a-half for overtime whereas Respondent had paid the terminated employees double time. When the parties executed a contract in July 1965, it provided double time for overtime. The $4 rate paid the independent contractor is equivalent to what the independent contractor was receiving as of January 1965, which figure, in addition to a basic hourly rate, includes also overtime rates and fringe benefits. It was also stipulated that the employees of the independent contractor for the period from 1959 to 1965 that were doing millwrights' work were paid the rates of millwrights under the contract between the building trades union and the Associated General Contractors in the Bay Area. See pages 843 and 935 of the record.

24. Union's Exhibit No. 23 shows the relationship between the wage rates in the Fibreboard contract, Foremost contract and BLS Occupational Wage Survey for the San Francisco-Oakland area for January 1958 and 1959. In January 1958, the Foremost rate was $2.93 and Fiberboard's $3.375; January 1959, Foremost $3.04 and Fibreboard $3.525. See page 7, *supra*, with respect to the wage rates received by Respondent's ILWU millwrights during the backpay period. See also Respondent's Exhibit No. 8(c).

indeed strange, to adopt the Union and General Counsel's formula under which the terminated employees would receive during the 1962-1965 backpay period a wage rate higher than the $4 hourly rate established in the contract executed by their Union with the Respondent in July 1965.[25]

Furthermore, to adopt the Pabco formula would be contrary to precedent, as the Board has repeatedly held that the fairest measure of computing backpay, in situations such as this, is to adopt a wage scale paid other employees in the same plant who do similar work requiring comparable skills. Loss of earnings of backpay claimants should be measured by the earnings of their replacements or comparable employees.[26] Probative of the fact that the work of the terminated machinists and ILWU millwrights was similar and required comparable skills is their identical wage scale prior to July 31, 1959, and the testimony of Maffey, Project Engineer at Fibreboard's Emeryville plant, that the dischargees who worked in the paint shop and felt mill were replaced by Respondent's ILWU millwrights.

Finally, it should be borne in mind that when it was agreed by the Respondent and Union in July 1965, that the reinstated employees should receive a wage rate of $4, the ILWU millwrights employed by Respondent were receiving approximately the same wage rate, namely $3.98½ an hour. Also corroborative of the soundness of this $4 rate is the cogent fact that it was higher than the cost of living increases which had accrued during the backpay period.

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25. Under the "Pabco formula," the wage rate would have been $5.40 as of August 1, 1967.

26. *Alaska Chapter of the Associated General Contractors,* 119 NLRB 663, 667; *East Texas Steel Castings Company, Inc.,* 116 NLRB 1336, 1337-1339, 1353; *Pugh and Barr, Inc.,* 102 NLRB 562, 564-565.

Accordingly, it is found that the formula to be applied in computing the terminated maintenance machinists' gross backpay is the wage rate paid by Respondents to its ILWU millwrights from September 14, 1962 to January 18, 1965.

The record is clear that the ILWU millwrights employed by Respondent not only performed work involving skills comparable to those of the terminated maintenance machinists, but also they were paid the same wage rates as the machinists from 1946 to July 31, 1959. Thus, on July 31, 1959, they, like the maintenance machinists, were receiving a wage rate of $3.525 per hour. Subsequent to the machinists termination, the ILWU millwrights not only continued to work throughout the backpay period but in a few instances replaced the terminated maintenance machinists in the felt mill and paint shop. From the fact that the ILWU millwrights received no wage increases in 1959 or 1960, it is not too unreasonable to assume that the ILWU recognized the soundness of Fibreboard's claim that the terminated machinists' wage rates under the "Pabco formula," which also determined the ILWU millwrights' wage rates, were "too high."[27] This is evidenced by the Company's action in terminating the machinists and subcontracting the maintenance work to an independent contractor at a wage rate less than the machinists had been receiving. Thereafter, beginning in 1962, the ILWU millwrights received the same wage *increases* as the ILWU production employees.[28] The ILWU millwrights were paid during the backpay period the following wage rates: July 1, 1962—$3.695 per hour; June 1, 1963

27. It strains one's credulity to believe the testimony of William Burke, Business Agent for the ILWU, that the reason the ILWU millwights in Respondent's plant received no wage increase in both 1959 and 1960 was because he forgot all about them.

28. However, at no time was the ILWU millwrights hourly wage rate the same as the ILWU production workers.

—$3.795 per hour; June 1, 1964 to June 1, 1965—$3.895 per hour.[29] For these and other reasons delineated below and based on Board precedent, it is found, that the wage rate during the backpay period paid to the ILWU millwrights in the performance of work comparable in skills to that which had been performed by the terminated machinists and whose wage rates for 13 years had been the same as the machinists is a reliable and logical yardstick and the best measure of what the maintenance machinists would have received during the backpay period.[30]

Indicative of the lack of realism in the position of the General Counsel and the Union that the dischargees should receive under the "Pabco formula" $4.505 per hour in January 1965, is the cogent fact that in July 1965, Local 1304 entered into collective-bargaining agreements with Fibreboard, Foremost Food and Chemicals Company and Encinal Terminals which provided a $4 per hour wage rate for the maintenance machinists employed by all these three companies. Also corroborative of the soundness of this $4 rate is the fact that it was higher than the cost of living increases which accrued during the backpay period and more than the highest wage rate received by maintenance machinists during the backpay period who were working for other employers under contract with Local 1304. On the other hand, the terminated employees would receive under the Union's

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29. These wage rates were highest payable to maintenance machinists under any contract which Local 1304 had with other Bay Area employers. See Respondent's Exhibits Nos. 7 and 9.

30. Maffey, a company official's testimony to this effect, stands uncontradicted which is confirmed by the ILWU millwrights' wage history after the machinists were terminated and also by Ferber, a union official, who on cross-examination testified that the bargaining unit employees did work "very similar" to Local 1304 maintenance machinists who were employed at other Bay Area plants with which the Union had contracts.

formula upon their reinstatement a wage rate higher than that in their contract executed in July 1965 with Respondent.

On the basis of the facts detailed above, and applicable precedent, it is found that in computing what the dischargees would have received during the backpay period beginning on September 14, 1962 and ending January 18, 1965, is the wage rates paid the Respondent's ILWU millwrights.[31] The Board has repeatedly held that the loss of earnings of backpay claimants should be measured by the earnings of their replacements or other comparable employees of the Respondent during the period involved.[32]

* * * * * * *

Interest on Backpay

There is disagreement among the parties as to whether these terminated employees who are entitled to backpay should also receive interest in view of the fact that the Board's supplemental decision contained no order that interest be paid.

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31. In September 1962, the ILWU millwrights were receiving $3.695; June 1963—$3.795; June 1964—$3.895; June 1965—$3.98½; June 1966—$4.075, and June 1967—$4.275. It should also be noted that from July 31, 1959, until June 1961, there was no increase in the ILWU millwrights' wage rates which would appear to indicate that the ILWU tacitly recognized that Local 1304's maintenance machinists' wage rate as of July 31, 1959, was excessive. This is further evidenced by the Company subcontracting the maintenance work to an independent contractor in August 1959 at a wage rate less than what the terminated machinists would have received under the Pabco formula. See page 935 of the transcript and Union's Exhibit No. 19.

32. *International Association of Heat and Frost Insulators, et al.*, 261 F.2d 347, 350 (C.A. 1).

Conclusions

Originally, the Board did not order payment of interest on the net backpay award where it was not required by the Board's original order.[63] Later the Board allowed interest on earnings lost as a result of "discrimination," even when the original order was silent thereon.[64] Thereafter, the Board on December 21, 1965, did not disturb a Trial Examiner's holding that interest should accrue on a quarterly basis from the end of each quarter for which backpay is owed with interest at 6 percent per annum.[65] It is, therefore, recommended that interest be paid on the net backpay from September 14, 1962, as provided in *Isis Plumbing & Heating Co.*, 138 NLRB 716.

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[The portion of the Trial Examiner's Decision relating to the picket-line misconduct has not been printed inasmuch as in his decision on this subject the Examiner found that, by reason of their violent conduct, two individuals were not entitled to reinstatement or backpay, but did not discuss the question whether Petitioner's defense under Section 10(c) of the National Labor Relations Act should be disallowed as untimely.]

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63. *Mooney Aircraft, Inc.*, 148 NLRB 1057 at 1059.

64. *Local 138, International Union of Operating Engineers*, 151 NLRB 972, 974; *Lozano Enterprises*, 152 NLRB 258, 260, footnote 8. Both these cases involved flagrant examples of discrimination as distinguished from the present case where there was no orthodox discrimination practiced, namely, a discharge for union activities or membership.

65. *American Compress Warehouse*, 156 NLRB 267, 276, footnote 35, enfd. 374 F.2d 573 (C.A. 5).

RECOMMENDED ORDER

On the basis of the foregoing, it is recommended that Fibreboard Paper Products Corporation, its officers, agents, and successors and assigns pay to each of the twenty-one individuals listed below, in order of their seniority, the sum of money listed opposite his name, plus interest, less deduction required by State and Federal laws:

Machinists

*L. J. Nash	See Appendix A, page i
W. Jackson	$ 3,912.23
D. Wittorff	4,230.45
M. Crispino	4,691.74
R. Hamidy	2,227.65
J. Cruze	5,783.16
E. Schlotterbeck	5,382.46
*F. Bennett	See Appendix A, page ii
M. Schoenfeld	1,867.06
G. Goranson	767.95
R. Jensen	12,982.30
J. Longnecker	4,142.79
H. Bradford	3,733.05
A. Fusare	4,916.71
J. Price	17,466.44
H. Cunningham	7,869.55
L. Raineri	14,974.66
W. Reihl	764.20
V. O'Leary	3,555.73
C. Fontes	None (See Appendix A, page iv)
D. Lippert	1,379.68

Power House Engineers

*F. Lowell	See Appendix A, page iv
R. Hughes	$ 13,363.09
H. F. Haueter	6,373.30
E. Johnson	13,214.92
G. Novacek	3,492.07
J. Griffin	1,837.79

	Power House Firemen
C. W. Olson	$ 10,042.61
E. Mann	5,117.06
J. Van Zoen	1,586.98
J. Wall	3,034.38
	$158,710.01

*These dischargees who elected to take early retirement received pension benefits in excess of the backpay owing them. See Appendix A.

Dated: May 23, 1968

Henry S. Sahm
Trial Examiner

[Appendix A to the Trial Examiner's Decision, consisting of six pages, has not been printed in this Appendix.]

Filed January 11, 1971

UNITED STATES COURT OF APPEALS,
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,772

United Steelworkers of America, AFL-CIO,

Petitioner,

v.

National Labor Relations Board,
Respondent.

No. 23,853

Fibreboard Corporation,

Petitioner,

v.

National Labor Relations Board,

Respondent.

JUDGMENT

Before: Wright and Tamm, Circuit Judges, and Matthews,* Senior District Judge.

THIS CAUSE came on to be heard upon petitions to review, and on a cross-application for enforcement of, an order of the National Labor Relations Board, dated December 15, 1969, against Fibreboard Corporation, its officers, agents, successors, and assigns. The Court heard argument of respective counsel on October 27, 1970, and has considered the briefs and transcript of record filed in this case. On Novem-

*Sitting by designation pursuant to 28 U.S.C. § 294(c), (1964).

ber 18, 1970, the Court, being fully advised in the premises, handed down its opinion denying the petitions for review, and granting enforcement of the Board's order. In conformity therewith, it is hereby

ORDERED AND ADJUDGED by the Court that the said order of the National Labor Relations Board against Fibreboard Corporation be enforced; and that Fibreboard Corporation, its officers, agents, successors and assigns abide by and perform the directions of the Board in said order contained.

JOHN WRIGHT
Circuit Judge, United States Court of Appeals for the District of Columbia Circuit

EDWARD ALLEN TAMM
Circuit Judge, United States Court of Appeals for the District of Columbia Circuit

Senior District Judge Matthews dissents from the foregoing judgment.

Filed January 18, 1971

UNITED STATES COURT OF APPEALS,
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,772

United Steelworkers of America, AFL-CIO,

Petitioner,

v.

National Labor Relations Board,

Respondent.

No. 23,853

Fibreboard Corporation,
Petitioner,

v.

National Labor Relations Board,

Respondent.

Before: Wright and Tamm, Circuit Judges; Matthews*, Senior District Judge; in Chambers.

ORDER

On consideration of the Fibreboard Corporation's petition for rehearing, it is

ORDERED by the Court that the petition of Fibreboard Corporation is denied.

Per Curiam
For the Court:
NATHAN J. PAULSON
Clerk

*Sitting by designation, pursuant to 28 U.S.C. § 294(c).